

IN THE MATTER OF	:	BEFORE THE
<b>ST. JOHN PROPERTIES, INC.</b>	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 11-011C

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**DECISION AND ORDER**

On June 27, August 8, September 14, and November 21, 2011, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use petition of St. John Properties for a gasoline service station conditional use in combination with a permitted convenience store in a B-2 (Business: General) zoning district, pursuant to Section 131.N.25 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to compliance with the hearing advertisement and notice requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sang Oh, Esquire, represented the Petitioner. Wayne Newton, Briana Darnell, Melanie Moser, Ken Schmid, and Michael Schammel testified in support of the petition. Ellen Bockelman, Mark Bockelman, Wayne Elseth, Joseph Morrone, Stephanie Dietz, Grafton Dietz, and Donna McGraw testified in opposition to the petition.

**Preliminary Matters**

At the outset of the June 27, 2011 hearing, the Petitioner requested a postponement, having substantially amended the conditional use plan. The hearing was rescheduled to August 8, 2011.<sup>1</sup> At the August 8, 2011 hearing, the Petitioner introduced into evidence a second amended conditional use plan dated June 27, 2011 (Petitioner's Exhibit 1A) and an alternative parking plan with additional parking spaces (Petitioner's Exhibit 1B). The Hearing Examiner determined they could be introduced into evidence because the plans are intended to respond to certain comments in the technical staff report (TSR) and are mitigative, not substantive. Accordingly, the term "Second Amended Plan" referenced in this decision and order refers to the June 27, 2011 plan introduced into evidence as Petitioner's Exhibit 1B.

At the September 14, 2011 continuation hearing, Opponent Ellen Bockelman sought to introduce into evidence a January 5, 1996 market and needs analysis prepared for the special exception petition in BOA Case 96-02E, the Board of Appeals-approved High's convenience store and gasoline service station located in the Lisbon Shopping Center. Upon objection from Petitioner's counsel that the document is a technical report, the Hearing Examiner determined it could not be admitted into evidence under Hearing Examiner Rule 7.4 because it was not filed at least 10 days prior to the date of the initial hearing. When the hearing was continued to

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<sup>1</sup> Pursuant to Hearing Examiner Rule 9.5, if the hearing examiner determines an amendment to a petition is substantive, i.e., the amendment proposes a use that is likely to adversely impact vicinal properties, then the hearing examiner will suspend the hearing for at least three (3) weeks. At least two (2) weeks prior to the rescheduled hearing, the petitioner must send written notice of the amendment and of the date, time, and place of the next hearing to all adjoining property owners, and must file an affidavit of written notification with the clerk. In addition, the petitioner must post the property with notice of the date, time, and place of the next hearing for at least 10 days immediately before the next hearing in accordance with §2.203(b) of the Board's Rules. The hearing examiner may request that DPZ review and make recommendations on the amendment.

November 21, 2011, Opponent Ellen Bockelman again sought to have the market and needs analysis submitted as a technical report based on Rule 7.4, which permits the hearing examiner to postpone the hearing upon the late filing of a technical report by any opponent. The Hearing Examiner accepted the filing, reasoning it allowed the Petitioner more than a month to review the document.<sup>2</sup>

The Petitioner introduced into evidence the exhibits as follows.

- 1A. Second amended conditional use plan, June 27, 2011
- 1B. Alternative parking plan, June 27, 2011
2. Landscaping plan, August 8, 2011
- 3A. Profile House 1 & 2 View Plane Section
- 3B. Profile House 3-5 View Plane Section
4. Aerial photograph of Property
5. Internal circulation of gasoline service station
6. High's building
7. Sign
8. Photometric analysis
9. Circuit Court Decision, Case No. 13-C-99-42127
10. Copy of Board of Appeals Case No. 96-02E
- 11A-U. Google images showing distance of residences from gasoline service stations
12. Technical Staff Report, BA 07-020C
13. Cross-Section, Lisbon Exchange
14. 360 degree panoramic photographs, Fulton High's
15. Stopping Sight Distance
16. Intersection Sight Distance
17. Maryland Department of the Environment, Air Quality General Permit to Construct Motor Vehicle Refueling Facilities Application Package, February 18, 2010
18. List of gasoline service stations by number of multi-product dispensers and distance from interstate
19. Photographs of High's/Shell gasoline service stations in Fulton and Glenelg
20. Internet posting, "Petrol station health warning," retrieved 11.21.2011
21. Aerial map correlating extent of "Rose cloud of influence submitted in Opponents Exhibit 4

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<sup>2</sup> Technical reports are not exhibits. They remain with the case file if the decision is appealed.

Opponents introduced into evidence the exhibits as follows.

1. I-70 sign depicting Shell gasoline service station logo, additional signage on MD 94 directing motorists to three gasoline service stations and other commercial uses
- 2A-B. Traffic Volume Maps, 1996 and 2010
3. Wind data
4. Fumes, Dust & Noise Danger Zone, based on Wind data, "Rose" map data image
5. Photographic views on Old Frederick Road
6. August 15, 2011 letter from Dr. Benjamin F. Papoi discussing patient with long-standing headaches
- 6A-B. For sale sign at house across from proposed High's and real estate literature

### FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. Property Identification. The subject property is located in the 4<sup>th</sup> Election District. It is referenced as Tax Map 7, Grid 6, part of Parcel 478 and is known as 15850 Old Frederick Road.
2. Property Description. The Property is 5.88 acres in size and is located on the north side of Old Frederick Road about 560 feet east of MD 94. The area of the proposed conditional use (the Site) comprises 3.25 acres in the western portion of the Property. The Site is generally rectangular with about 258 frontage feet. A deteriorated paved driveway sited about 85 feet from the west property line currently provides access to the Site. The Site is improved with an old building in the southwest corner, a paved parking pad partially bordered by a wood fence to the building's east, a concrete pad further to the north and a wood fence along a portion of the frontage. These items will be removed for the proposed development. The remainder of the Site is generally open, with some exiting trees and other vegetation along

the road frontage and the west and north lot lines. The highest elevation on the Site is the area to the north of the existing building. From here, the Site drops 6-8 feet in elevation to Old Frederick Road and about 186 feet to the lowest elevation in the Site's northeast corner.

3. Vicinal Properties. To the west, the adjoining B-2 Parcel 226 is the site of a PNC bank. To the northwest and north is Parcel 82, Lot G which to the Site's northwest is zoned B-2 and RC-DEO (Rural Residential: Density Exchange Option) to the Site's north. The B-2 portion is the site of the Lisbon Shopping Center, which comprises a large parking lot, a grocery store on the east side and several freestanding pad sites along the west side. Near the south entrance from Old Woodbine Road is a High's convenience store with a canopy-covered motor fueling area approved in BA 96-02E. The RC-DEO zoned northern portion of the Site is improved by the shopping center's septic easement and stormwater management areas.

To the Property's east is the RC-DEO zoned Parcel 99, the three-lot Stout Property subdivision. Each lot is improved with a single-family dwelling. The dwelling closest to Old Frederick Road has a circular driveway access and the two dwellings to the north share a long driveway running close to the Property's east side lot line.

To the south, across Old Frederick Road, the RC-DEO zoned Parcel 393 is improved with a single-family detached dwelling fronting on Old Frederick Road, and the RC-DEO zoned Parcel 333, a single-family dwelling fronting on Old Woodbine Road. There are two single-family detached dwellings fronting to the north of Parcel 333 and generally to the Site's southwest.

4. Roads. Old Frederick Road in this location has two travel lanes and about 21 feet of paving within a proposed 80-foot wide right-of-way (ROW). The posted speed limit is 30

MPH.

5. General Plan. According to the TSR, the 2000 General Plan Policies Map 2000-2020 designates the Property as "Rural Conservation." The 2000 General Plan Transportation Map 2000-2020 depicts Old Frederick Road as a Major Collector

6. Water and Sewer Service. The Property will be served by private water and septic facilities.

7. Zoning History. The TSR notes the zoning history as follows.

BA 07-02C. The Hearing Examiner approved Woodbine/Brantley LLC's age-restricted adult housing conditional use petition on December 24, 2007. The decision was appealed to the Board of Appeals and the appeal is currently on the unscheduled docket.

BA 99-06E. Special Exception denied on June 4, 1999 for a special exception for a contractor storage facility

BA 96-02E. Special Exception granted to High's of Baltimore's petition for a special exception for a gasoline service station with a convenience store

BA 984-C Appeal of Director of Planning and Zoning decision for storage for explosives in a B-2 district approved on February 28, 1979

8. Technical Staff Report. DPZ issued the TSR on June 20, 2011. An addendum to the TSR was prepared on July 28, 2011 at the Hearing Examiner's request upon receiving the Second Amended Plan at the June 27, 2011 hearing. The TSR recommends the petition be denied. The General Evaluations and Conclusions section offers the following primary reasons for this recommendation. Revised comments in the Addendum are noted as "A."

- the market for the gas station use would include "some element" of I-70 travelers
- there may be greater impacts to the nearby residential uses than at another B-2 location owing to the Site's elevation and access along Old Frederick Road

- contrary to General Plan Rural West Policy 3.10 (as discussed below)
- potential for greater noise impacts due to the proposed hours of operation and Site elevation
- potential for greater lighting impacts
- closeness to area residences and elevation of Site have adverse lighting effects
- insufficient landscaping
  - A. Some screening and buffering of the canopy and fueling areas because of tree heights and extant of shrubs along the frontage. Unscreened views into the site will continue to be a problem owing to the location of the entrances. Screening would be reduced during winter months as deciduous trees lose leaves
- location along a two-lane road from multiple single-family detached residential uses
- inadequate parking
  - A. Different parking tabulation from original plan still does not comport with DPZ determination that 6 parking spaces for each 1,000 sq. ft. of floor area is required because convenience store is primary use and fueling service is ancillary use. Revised plan shows buffering for parking and refuse area. Plan does not address how the driveway locations are proper relative to nearby residential parcels
- potential sight distance problem for east bound motorists on Old Frederick Road
  - A. Revised plan shows sight distance details for improvement to meet proper standards with official review at site development plan stage

The TSR also questions the overall parking tabulation depicted on the conditional use plan, it being unlikely that offices would be the sole use of the 24,750-sq-ft., one-story commercial building depicted on the eastern portion of the Property. The TSR therefore comments that the overall parking tabulation does not consider potential retail uses, such as restaurants, with a 5.0 parking space requirement per 1000 sq. ft. of floor space. The Addendum reiterates the Petitioner's need to explain the overall parking plan further.

9. The Proposal. The Petitioner proposes to develop the Site with a gasoline service station conditional use in combination with a convenience store. The combination of uses is permitted subject to the criteria in Section 131.N.25.i, as discussed below.

The Gasoline Service Station. According to the Seconded Amended Plan, and witness testimony as set forth in these Findings of Fact, the gasoline service station would consist of a 32' deep by 80' wide canopy over three fuel islands. Each fuel island would comprise six double-sided multi-product dispensers (MPDs). Diesel fuel would be dispensed from one of the MPDs.

Vehicle repair. None

Tire Air Pressure. See Findings of Fact

Self-vacuuming. See Findings of Fact

The Convenience Store. A 60-foot by 80-foot, 4,800-square foot convenience store is proposed to the north of the gasoline service station and 36 feet from the Site's southwest edge.

Vending. None

Propane Sales. None

Both Uses

Hours of Operation. 5:00 a.m. – 12:00 a.m.

Lighting. See Findings of Fact

Employees. Two-three employees on site at any one time for both the gasoline service station and convenience store

Parking. Petitioner Exhibit 1A depicts 31 parking spaces. Twenty-three spaces would be located around three sides of the convenience store, and eight spaces to the west of the store. Petitioner Exhibit 1B, an alternative parking plan depicts 35 spaces, for a total of 12 spaces to the west of the convenience store. The Petitioner prepared Plan 1B in response to a TSR comment about the required number of parking spaces.

Signage. The Landscape Plan depicts a proposed 6' x 8' monumental sign near the western access

Access. The Second Amended Conditional Use Plan depicts two 35-foot entrances on either side of the canopy

Landscaping. See Findings of Fact

**PETITIONER'S TESTIMONY**

**The Fuel Canopy/Gasoline Service Station**

10. Mr. Newton testified the fuel canopy would be 15 feet from its bottom edge and 19 feet to the height of the fascia. Twelve pumps and 2 diesel fueling areas are proposed at 6 multiple product dispensers (MPDs) on three fueling islands. The diesel fuel pumps have been moved to the end of the western island in the Second Amended Plan and the diesel and



gasoline pumps share the same area, so 12 vehicles could fuel at once. Residents would not be able to view the canopy because the proposed and existing landscaping on area residential properties would buffer or screen the view. On cross-examination, he explained that each of the three fueling islands would have four gas fueling positions. The end western island has an extra diesel pump on each island.

11. On recall, the Hearing Examiner's observed that the Second Amended Plan does not show the location of air and vacuuming services, which the TSR noted is a proposed use. Mr. Newton responded by stating that he does not typically show air and vacuuming on plans. However, they are likely to be located opposite the fuel canopy along the Site's western edge, which has a proposed Type A landscape edge.

#### Odors

12. On rebuttal, Michael Schammel testified to being the owner of Maryland Pump and Tank, a petroleum equipment contractor that installs underground storage tanks, pumping, canopies and related materials. High's would use his company to install the tanks, piping and dispensers. He introduced into evidence Petitioner's Exhibit 17, a Maryland Department of the Environment, Air Quality General Permit Application, which covers an operator's obligation to comply with stage 1 and 2 vapor recovery at retail fueling facilities. During Stage 1, delivery trucks capture and return vapors. During Stage 2, the vapors from fueling up a vehicle are recovered through the nozzle and returned to the underground tank.

13. On cross-examination from Mr. Elseth and Ms. Bockelman, Mr. Schammel testified that the applicable laws require a range of tolerance, meaning a recovery percentage.

For every gallon dispensed, approximately a gallon of vapor should be recovered. The recovery percentage is an air to liquid ratio with a 90-110 percent recovery rate. A higher rate reflects a loose recovery method. A service station operator is required by law to test Stage 2 recovery on a daily basis. Older vehicles may not have efficient vapor recovery.

14. In her recall testimony, Briana Darnell, High's Director of Real Estate, testified that the Rose data 4,000-foot distance depicted on Opponent's Exhibit 4 (as discussed below), does not accurately reflect the likely range that gasoline fumes would travel. Petitioner's Exhibits 20 and 21.

#### **The High's Convenience Store**

15. Mr. Newton testified that the 40'x80' (4,800 sq. ft.) High's convenience store, which is allowed as a matter of right, would be about 20 feet in height with a residential appearance and roofline. On cross-examination, Mr. Newton testified that the Second Amended Plan pushed the convenience store back 24 feet, which lessens its appearance from the street.

16. Ms. Darnell testified that High's is a 48-chain, family-owned operation with stores in similar neighborhoods, including Fulton, Glenelg, Cooksville, Rogers Avenue, and West Friendship. High's serves a more rural demographic. Consequently, High's now uses a rural prototype with a brick front, taupe color, and crown molding, as is depicted in Petitioner's Exhibit 6.

17. Ms. Darnell also testified that the lighting for the convenience store is flush mounted and downward facing. The proposed hours for all uses are 5:00 a.m. to 12:00 a.m. The

current store at the Lisbon Shopping Center was constructed in 1996. It is a small convenience store with less food service. The proposed High's would include ADA accommodations and wider aisles. The proposed store is similar to a High's in Cooksville, where there are nearby homes located at about the same distance as the residences at the proposed Site. The proposed diesel fuel flow is not high enough to attract truckers, but it would attract landscape contractor trucks, similar commercial vehicles, and other rural users.

18. On cross-examination, Ms. Darnell testified that other High's locations have residences close by but she did not know their zoning. It was her further testimony that fuel delivery is scheduled to avoid rush hours. High's intent is to abandon the exiting site.

19. In response to cross-examination questioning from Grafton Dietz, Ms. Darnell testified that the store services several hundred customers a day and that the product offering would be identical.

20. During redirect, Ms. Darnell testified the Cooksville High's was approved through a Business Rural rezoning in accordance to with a modification to a preliminary development plan. It is located near MD 97 and would be moved southward closer to existing homes, about 75-100 feet.

21. On recall, Ms. Darnell stated that the proposed floor sales area is identical to the existing store and there is no difference in product offering. The increase in floor area is to meet ADA specifications and widen aisles. The foods offered are the same and the store is not offering more of the same product. When questioned by the Hearing Examiner as to the size of the convenience store, the largest approved in association with a gasoline service station

conditional use, Ms. Darnell stated that the interior is nearly identical to the recently renovated Rogers Avenue High's, the difference being larger bathrooms and a larger refrigerated storage area. Additionally a second renovated High's is already too small and Royal Farm stores are larger than any High's store.<sup>3</sup>

### Customer Base

22. Ms. Darnell testified during rebuttal that the increase in MPDs from three to six (plus diesel) would not cater to the needs of interstate travelers. In her view, the location is too far from interstate traffic. The number of MPDs proposed is consistent with the typical gasoline service station, which generally has six MPDS, including the High's locations in Fulton and Glenelg. As indicated by the list comprising Petitioner's Exhibit 18, there are six gasoline service stations with six to eight MPDs located between .2 and .6 miles from I-70, yet these stations do not cater to interstate travel. If a service station operator wants to attract interstate traffic, it would operate 24 hours a day and have high-flow pumps to please interstate travelers.

23. In response to questions from the Hearing Examiner about how the needs of motorists on I-70 are met when there are no interstate rest stops, Ms. Darnell replied that there are gasoline service stations on Marriottsville Road, in West Friendship, Cooksville, Lisbon, and on Route 27 in Mt. Airy. She reiterated that the proposed station would draw on the same amount of interstate traffic as the existing station in the Lisbon Shopping Center.

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<sup>3</sup> The Hearing Examiner referenced several decisions approving gasoline service stations with convenience stores of lesser size, including 10-023C (3500 sq. ft.), BA 09-012C (no change with increase in MPDs), BA 08-049C (1,800 sq. ft.), BA 08-045C (3,500 sq. ft./Highs), BA 08-001C (3,939 sq. ft.), and BA 06-0101C (no change in size, increase in MPDs), and BA 06-009C (2880 sq. ft.)

**Landscaping/Buffering and Screening**

24. Mr. Newton testified to preparing the Landscaping Plan (Petitioner's Exhibit 2). It screens and buffers the use to the southeast and north (rear) and saves trees along perimeters to the extent possible. The required landscaping frontage is exceeded in many areas. The main purposed is to screen and buffer the use.

25. Discussing Petitioner's Exhibit 3A and B in reference to Petitioner's Exhibit 4, an aerial view, Mr. Newton explained the exhibits depict profiled plane sections between 5 residences across Old Frederick Road and the proposed landscaping and uses. The lines of sight run from the centerline of each depicted residence and 5 feet above ground to the centerline of the proposed canopy. There are two lines of sight, one from the road and the second from the higher landscaping material. According to Mr. Newton, the exhibits show what would be seen through the landscaping, which is that the canopy would be screened. Existing landscaping on the residential properties will help to screen the canopy. The change in elevation has no effect because the height of existing landscaping will provide cover.

26. During cross-examination, Mr. Newton testified that the view planes consider grade differences. He agreed that changing the centerpoint for each house would change sightlines and may or may not hit trees. However, the landscaping plan would mitigate any effects by providing additional screening. The proposed building on the eastern portion of the Property would screen the houses to the east.

27. On cross-examination by Wayne Elseth about Mr. Newton's testimony concerning the sight lines between the proposed use and area residences depicted in

Petitioner's Exhibits 3A&B, Mr. Newton explained that the sightline assumes a 5-foot sight line, which is the average height of a person's eyes.

28. On cross-examination from Joseph Morrone, Mr. Newton testified that the five two-story houses southeast of Old Frederick Road were not included in the line-of sight analysis for the reasons as follows. One house is behind house #5, so the view is the same. Existing vegetation blocks the view from the houses on the southeast corner of the view on the property at house #5, but for a small section. The house on the northeast corner is on the other side of a stand of vegetation so it is screened from view. When asked about the view from the second story of these houses, and the absence of any profile from the second story of any houses, Mr. Newton stated that existing trees near house #5 would provide a sufficient buffer.

29. During redirect, Mr. Newton testified that Petitioner's Exhibit 5 is a photometric analysis of lighting locations around the Site, which is lit only by the canopy and lights on the soffit of the High's building, with a few spotlights for security. The light level is measured in lumens, and is 40-45 lumens at the canopy and zero lumens at the property line. This shows that the light around the western edge and Old Frederick Road is zero lumens, which indicates that light levels on the Site have been minimized. In his opinion, this means the adverse impact of lighting at the Site would not be greater than at other locations, especially considering the proposed landscaping.

30. Landscape architect Melany Moser testified to reviewing the landscape plan and the TSR. She also participated in preparing the landscape plan. With respect to the proposed landscaping along the western edge, Ms. Moser testified it would consist of evergreen trees

and shrubs. The landscaping along Old Frederick Road (the property frontage) would consist of smaller deciduous trees and evergreen shrubs due to overhead power lines. In her opinion, the proposed combination provides the most buffering. The ornamental trees would be most effective during summer when people are outside. The proposed hedging provides screening at eye level when looking up at the Site.

31. Describing Petitioner's Exhibit 13, Ms. Moser testified to it being a cross-section taken from Old Frederick Road to the Property line. In her opinion, it depicts the effectiveness of the proposed landscaping along Old Frederick Road. A fence or wall border along Old Frederick Road, as may be required by Section 131.N.25.e (as discussed below), is not an appropriate solution to a rural area because softer landscaping is a better approach. She further opined that Section 131.N.25.e does not apply to the petition because the Site is not adjacent to a residential district, reading "adjacent" as requiring the use to share a physical border or boundary.

32. On recall, the Hearing Examiner questioned Ms. Moser about the Type E landscape buffer proposed along Old Frederick Road. Ms. Moser responded that the Landscape Manual does not require Type E landscaping along the front of the proposed use. However, a Type E landscape buffer would be required for the parking related to the commercial building depicted on the Second Amended Use Plan, so the Petitioner is extending it in front of the canopy. She was unaware that the Landscape Manual requires a 20-foot landscape edge (Landscape Manual, Pg. 17), but upon measuring the area on the Landscape Plan, determined it would meet this requirement. However, a wall or fence could not be installed in this area owing

to the presence of the bio-retention areas.

33. On furthering recall questioning, the Hearing Examiner queried Ms. Moser as to whether the proposed onsite landscaping would provide adequate buffering if the existing landscaping off-site (as depicted in Petitioner's Exhibits 3A&B) was discounted. Ms. Moser replied that the buffering requirements are not a complete screening requiring, so in her opinion the proposed landscaping is sufficient. Upon further questioning, Ms. Moser testified that the existing and proposed landscaping along the eastern edge of the Property would be maintained and installed to provide an efficient buffer. The Petitioner would install the proposed plantings along the eastern edge, along all of Old Frederick Road, and in the large island just to the east of the proposed convenience store during the construction of the gasoline service station and convenience store.

#### **Parking**

34. As Mr. Newton testified, Petitioner's Exhibit 1A depicts 19 parking spaces based on his reading that the convenience store is ancillary and only 2 spaces per 1000 square feet are required. However, in response to the TSR's comments that the convenience store is the primary use requiring 6 spaces per 1000 sq. ft. the Petitioner prepared an alternative Second Amended Plan, Petitioner's Exhibit 1B, which depicts parking based on 6 per 1000 sq. ft.<sup>4</sup> The parking is now at least 150 feet from Old Frederick Road.

#### **Dumpster**

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<sup>4</sup> The TSR's comments about the number of parking spaces required for gas station conditional uses in combination with convenience stores are not inconsistent, as Petitioner argued. On Pg. 5 of the Addendum, the TSR stresses that the Second Amended Plan without explanation changed the parking calculation from 6.0 parking spaces for each 1,000 square foot of convenience store floor area in the initial conditional use plan to 2.0 per 1,000 sq. ft.



35. Mr. Newton testified the dumpster would be screened with board on board fencing. It will be located behind High's.

**Access/Sight Distance**

36. According to Mr. Newton, most traffic would come from the west, off MD 94. Because the current High's and gasoline station is currently accessed from Old Frederick Road and Old Woodbine Road, the traffic pattern will remain the same. It was Mr. Newton's testimony that vehicles and gas tankers would safely enter the site from the eastern entrance and leave through the western entrance. Referring to Petitioner's Exhibit 5, he further testified that the exhibit indicates the internal circulation pattern for gas tankers and demonstrates the safe circulation of a gas delivery truck. The turning radius is designed for a WB 50 truck standard. On cross-examination, he explained that WB refers to "wheel base" and WB 50 is a wheel base standard developed by AASHTO (the American Association of State Highway and Transportation Officials). The wheel base is used to determine the necessary turning radius. From the inside edge of the truck on the road to the inside of the area where it will refuel is 70 feet.

37. Traffic engineer Ken Schmid testified to preparing a preliminary traffic analysis for the proposed use. In his opinion, the analysis demonstrates that the access driveways and on-site paved areas are designed and located to ensure safe and efficient movement of traffic and pedestrians. The site is designed to separate fueling from other uses. The site has two access points. The western entrance has adequate sight distance. The stopping distance would allow safe access on the 30 MPH road. The intersection sight distance at the entrances will

permit safe left turns at 40 MPH. The required 450-foot intersection sight distance is available for the western entrance. For the eastern entrance, the proposed grading plan will increase the sight line to the required distance. Petitioner's Exhibit 16. As Mr. Schmid also testified, Petitioner's Exhibit 15 depicts stopping sight distance along the road for both entrances in excess of 300 feet for a 40 MPH road.

38. During cross-examination from Mr. Bockelman about the impact of a school bus stop near Old Woodbine Road on the proposed entrances, it was Mr. Schmid's testimony that the rules of the road would control. Motorists could see the bus stop and it does not alter his conclusions about safe access. Upon further cross-examination by Mr. Bockelman, Mr. Schmid testified that traffic volumes would not increase after motorists left the gasoline service station because there is already an established use (persons gassing up at the existing High's and then visiting restaurants). Persons already visiting the existing High's use Old Woodbine Road to access the shops in the village center and he anticipates they would continue to use this route. However, there would be an increase in traffic along the western portion of Old Frederick Road.

39. In response to cross-examination questioning from Grafton Dietz, Mr. Schmid testified that several hundred customers come from the traffic circle, including some from the area and some from I-70. Petitioner's Exhibit 18.

#### **Stormwater Management (SWM)**

40. Mr. Newton testified that the state considers gasoline service stations to be hot spots and therefore encourages stormwater to be infiltrated. Petitioner's Exhibit 5 introduced into evidence therefore depicts several bio-retention infiltration ponds areas in grey.

Stormwater would filter into these on-site detention ponds or a detention pond on the Lisbon Shopping Center site. Any discharge would not exceed current runoff levels. To address water safety, the gasoline tanks are lined and there are additional safety measures. Topography and drainage could handle any tanker spillage. However, the purpose of SWM is to manage rainwater, which exceeds the volume of a tanker.

41. In response to a cross-examination question from Donna McGraw, who lives directly to the east, Mr. Newton testified that stormwater would drain to Old Frederick Road and the natural grade to the east. Stormwater in the back would drain to the northern SWM pond. He did not look at the drainage from the building depicted on the eastern portion of the Property because it is not part of the conditional use application.

#### **Signage**

42. Briana Darnell testified that the Second Amended Conditional Use Plan depicts the location of the sign for the uses. Petitioner's Exhibit 7 depicts the proposed sign.

#### **The Commercial Structure Depicted on the Eastern Portion of the Property**

43. Mr. Newton testified that the one-story commercial building depicted on the eastern portion of the Property is intended only to provide a context for what could possibly be developed there as a matter of right.

#### **TSR/General Plan**

44. In her direct testimony, Ms. Moser disagreed with the TSR's conclusion that the proposed gasoline service station should be denied in part because it would have an atypical adverse impact, being sited closer to residential homes than other gas stations. In her opinion,

the proximity of surrounding residences to the proposed gasoline service station is not atypical. To support this opinion, she discussed the 23 images comprising Petitioner's Exhibit 11A-V, which include aerial photographs and several existing High's stores and gasoline service stations, which Ms. Moser personally photographed. These distances are as follows.

- 11A. Site and closest residence, 300 feet
- 11B. Site and area residences
- 11C. Existing High's, 249 feet
- 11D Clarksville, existing gasoline service station off 108 ,249 feet
- 11E. Old Columbia Pike, 190 feet
- 11E2. US 40, 133 feet<sup>5</sup>
- 11F. Levering Avenue, 86 feet
- 11G. King's Contrivance, 223 feet
- 11H. ElkrIDGE Shell, 53 feet
- 11I. ElkrIDGE Route 1, 148 feet
- 11J. Hickory Ridge, 220 feet
- 11K. Harper's Choice, 215 feet
- 11L. River Hill, 217 feet
- 11M. Owen Brown, 168 feet
- 11N. Old Annapolis Road 163 feet
- 11O. Montgomery Road, 260 feet
- 11P. Maple Lawn, 186 feet
- 11Q. Long Reach 233 feet

#### Gasoline Service Stations Outside the Planned Service Area

- 11R. Fulton, MD 207 120 feet
- 11S. West Friendship, 245 feet
- 11T. 15877 Frederick Road
- 11U. 16035 Frederick Road
- 11V. 11749 Frederick Road

45. It was Ms. Moser's testimony that each gasoline service station depicted in Exhibit 11 was approved in areas where residential dwellings are as close or closer to the

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<sup>5</sup> During the hearing, the Hearing Examiner mistakenly numbered two images as Exhibit 11E.

proposed gas station. Exhibit 11A & B depict the Site and closest residence, which is about 300 feet distant. Exhibit 11C depicts the 249-foot distance from the existing High's in the shopping center and the nearest residence. Exhibit 11T-V depicts three gasoline service stations on Frederick Road. In these photographs can be seen adjoining residences properties quite close to the station. In her opinion, the photographs demonstrate that the proximity of the proposed gasoline service station to area residences is not atypical. She also reviewed the existing High's stores that are close to residential areas and concluded the uses coexist very comfortably. In response to questions from the Hearing Examiner, Ms. Moser testified that she did not know if the stations in the photographs were nonconforming uses, nor did she know the zoning of each site.

46. In response to a cross-examination question from Mr. Morrone about the zoning of gas stations depicted in Petitioner's Exhibit 11A-V, she agreed that the one in Lisbon had been there for some time, so there must be some level of compatibility, in her opinion.

47. Ms. Moser further testified in relationship to the zoning history discussed in the TSR. BA 96-02E (Petitioner's Exhibit 10) does not pertain to the proposed site. With respect to BA 99-006E, which the TSR states was denied, she testified that while the Board of Appeals denied it, the circuit court reversed and approved it. (Petitioner's Exhibit 9).

48. Ms. Moser offered substantial testimony contradicting the TSR's comments on General Plan Policy 3.10, which was a significant factor in DPZ's recommendation to deny the petition. The Policy states as follows.

***Policy 3.10: Direct commercial expansion and redevelopment efforts to existing***

***commercial crossroads in the Rural West.***

- ❖ **Commercial Centers.** Locate non-residential development in and around existing Rural West Centers. Limit such development to a scale appropriate to serve the local needs of the surrounding community rather than the interstate traveler.
- ❖ **Community Planning.** Use Community Master Plans or Enhancement Programs as a means to address expansion and redevelopment of Rural West commercial crossroads and community centers.
- ❖ **I-70 Corridor.** Discourage economic development unless immediately adjacent to an interchange and compatible with rural agricultural and residential uses in the vicinity.

Ms. Moser testified to an absence of correspondence between the TSR's comments in relation to the third bullet and to what she considered to be the relevant preceding General Plan text, a comparison of I-70 to I-270 in Montgomery County concluding the absence of public water and sewer along I-70 is one reason why I-70 would not support the type of development that exists along I-270. It was her further opinion that the first bullet in General Plan Policy in 3.10 does support the proposed use. In her view, the Property is commercially zoned located within a rural center. Additionally, the Site is not visible to a traveler along US 70 or MD 94. Customers who would come to High's or the gasoline service station would do so because they know it's there.

49. It was Ms. Moser's continued opinion that the Site should not be considered a Rural Conservation land use, as does the TSR. She observed that in a prior case concerning the Property (BA 07-020C), the TSR designated the Property as a Rural Conservation Area adjoining a Village and Community Center.

50. Based on her experience, there are no atypical or non-inherent adverse impacts because Policies Map 2000-2020 of the 2000 General Plan designates the Property as a "Rural

Conservation Area" adjoining a "Village and Community Center" and the General Plan's Transportation Map designates Old Frederick Road as a major collector. There are service stations on minor roads and on non-commercial property. Because there is less traffic coming from the east, the site is a good location because most traffic would continue to come from MD 94. The Site can also accommodate the amount of parking DPZ is requiring. In the summertime, prevailing winds are from the south and southwest, so odors would travel north. While in the winter, the winds would come from the north and northeast, there would be less impact due to the season and proposed landscaping. She did not feel the proposed use would adversely effect the logical development of the neighborhood or area where the station would be located because logical development in some measure determined by zoning, which here is B-2. There would be no proliferation of gasoline service stations because there is only one station north of I-70, the Shell station in the Lisbon shopping center, which would be removed. The collector function of MD 94 is another reason why the proposed location would not adversely effect the logical development of the area.

51. The Hearing Examiner queried Ms. Moser about her General Plan testimony. Ms. Moser repeated her testimony that the proposed use would not attract travelers from I-70. When queried as to her knowledge of gas station or High's signs at the I-70 off ramp to MD 94, Ms. Moser was not aware of a High's sign or commercial signage at this location. On redirect, she stated that to her knowledge, any sign on I-70 would not become more prominent and the existing sign would not cause an increase in traffic off I-70. She did not believe there would be an increase in traffic from the proposed use.

52. In response to cross-examination questions from adjoining property owner Stephanie Dietz, Ms. Moser testified that the landscape buffer would mitigate gas station noise. In her opinion, other communities appear to coexist with the gas stations depicted in Exhibit 11A-V, because they would have otherwise put in their own screening or fences.

**B.**  
**OPPOSITION TESTIMONY**

53. Ms. Bockelman introduced Opponents' Exhibit 1A-E, photographs of five signs along I-70, two off-ramps to MD 94, and along MD 94 near the traffic circle at Old Frederick Road. These photographs direct I-70 motorists to the Shell gas station in the shopping center, to the Citgo and BP gas stations south of I-70 on Frederick Road, and nearby commercial uses. It was her testimony that the triple increase from 4 to 12 gas pumps and a High's store that is twice the (4800 sq. ft.) of the existing store is intended to serve not only the local community, but also I-70 motorists.

54. Ms. Bockelman also testified that the proposed gasoline service station would not support the needs of the local community, and so is contrary to General Plan Policy 3.10.

55. According to Ms. Bockelman, there is a Citgo gas station about 1.1 miles away on Route 144 east of MD 94 and a BP station just beyond the Citgo station. These two gas stations plus the existing High's Shell station provide sufficient services for the community.

56. Referring to Opponents' Exhibit 2A and 2B, traffic volume maps for the area that Ms. Bockelman obtained from the Maryland State Highways Administration web site, she testified that the annual average daily traffic trip levels measured by counter # 46 along I-70



between MD 32 and MD 97, had increased about 50 percent from between 1996 and 2010 (from 49,189 to 74,449). In her opinion, the increase in traffic along I-70 almost certainly brought additional business to the current High's and will bring additional traffic to the neighborhood if the proposed gasoline service station is approved. Moving it to the proposed site will relocate it even further from I-70.

57. Wayne Elseth testified to the effect of prevailing winds as they would generate odors from the gasoline service station. Referring to Opponents' Exhibit 3, a wind direction and speed study and an aerial overlay showing direction, not distance, he testified to the images demonstrate the directionality of prevailing winds as seasons change. The Baltimore-Washington Airport is the source of the data. In response to questions from the Hearing Examiner about the directionality of winds on several gasoline service stations depicted in Opponents' Exhibit 3, Mr. Elseth testified that the wind direction would be the same for several stations. The "Rose" data information laid over an area aerial map shows the extent of the gas station's "fumes, dust, and noise danger zone."

58. Stephanie Dietz testified to residing immediately east of the proposed gasoline service station. She now sees the glow of the light from the existing gasoline service station. Her child would be adversely affected by the use because she is hypersensitive to odors, including gasoline fumes. She introduced into evidence Opponents' Exhibit 6, a letter from her daughter's physician stating that his office has been treating the young Ms. Dietz for headaches, which are exacerbated by smells and rapid travel. He has previously recommended that the young Ms. Dietz to avoid elevated levels of gas fumes. Stephanie Dietz also stated her

livestock that would ingest the pollution and her family would be adversely affected by the food products they consume. She is also opposed to the project because the High's would have safety lighting on all night.

59. On cross-examination, Ms. Dietz testified that her home is about 600 feet from the proposed gas station. She did not think that the Petitioner's offer to construct a fence along the common property line would screen the fumes.

60. Donna McGraw testified that the homeowners directly across the street put their house up for sale after the pre-submission meeting. Opponents' Exhibit 6A and 6B. In her view this is probative of the development having an adverse impact on future property values.

## **CONCLUSIONS OF LAW**

### **I. Background Issues**

The Site is 3.25 acres. The proposed gasoline service station conditional use and the High's convenience store are to be constructed on this Site. A portion of the proposed buffering is located on the larger 5.88-acre Property, which may be developed in the future with a commercial structure.

Of issue in this case is the scale and intensity of the proposed gasoline service station in combination with the permitted convenience store on the 3.25-acre Site. Although the uses and structures meet all setbacks, of concern is the Petitioner's plan to meet its obligations to buffer the proposed uses based partly on the presence of existing vegetation on area residential properties and on the existing and proposed vegetation on the eastern portion of the Property, which is not part of the conditional use Site. This concern is echoed in the TSR, which in its

evaluation of the petition according to Section 131.N.25 (the specific criteria for gasoline service stations) reasons "there appears to be little potential for landscaping areas in front of the Site" (Pg. 10).

Also of concern is the Petitioner's wherewithal to augment the proposed and existing landscaping on the Site with a Landscape Manual Type E evergreen tree buffer and/or a fence or wall as conditions of approval. The conditional use plan already has twice been revised and it appears there is insufficient land to revise the plan again in order to provide the appropriate buffer. This lack of sufficient land along Old Frederick Road is owed in part to the scale of the proposed uses and to the location of bio-retention ponds within the landscape area. The Petitioner's ability to buffer the use properly is also hampered by the presence of overhead power lines, which directs the type of landscaping buffer proposed (smaller trees and evergreen shrubs), according to Ms. Moser. The Hearing Examiner's conclusions as to the insufficiency of the proposed onsite buffer are discussed below.

In light of these background considerations, and based upon the foregoing Findings of Fact, I conclude as follows.

## **II. General Criteria for Conditional Uses (Section 131.B)**

**A. Harmony with the General Plan.** Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

A first matter to be addressed is the Site's land use designation in the Howard County General Plan. According to the TSR, the Site is designated "Rural Residential." Petitioner witness Melany Moser challenged this designation, pointing out that in Board of Appeals Case No. 07-020C, the TSR designated the Property as a Rural Conservation Area adjoining a Village and Community Center. During the proceeding, the Hearing Examiner took notice that the Policies Map on Page 259 of the General Plan denotes Village and Community Centers with a star; hence, the boundaries of the Lisbon Village and Community Center are not fixed along property lines or within a designated area. Additionally, the TSR qualifies its characterization of the Site as a Rural Conservation land use as a "predominately Rural Conservation area," which "can also be viewed as being within the I-70 corridor" (Pg. 7).

The issue of whether the proposed use is harmonious with the General Plan is not simply a matter of reciting the land use designation of a specific site.<sup>6</sup> The heart of any determination as to a proposed use's harmony with the General Plan in Howard County is the use's comportment with the land use policies applicable to a specific site.

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<sup>6</sup> The Hearing Examiner notes the Policies Map on Page 259 is just that. It is not strictly a land use map, which would more directly control what uses are appropriate for a given site. In describing its organization on Page 5, the General Plan states that the traditional elements of a General Plan, including land use, may appear several times in order to integrate related issues.

On this basis, the Hearing Examiner concludes the following policies set forth in General Plan Policy 3.10 are applicable to the petition.

- ❖ **Commercial Centers.** Locate non-residential development in and around existing Rural West Centers. Limit such development to a scale appropriate to serve the local needs of the surrounding community rather than the interstate traveler.
- ❖ **I-70 Corridor.** Discourage economic development unless immediately adjacent to an interchange and compatible with rural agricultural and residential uses in the vicinity.

Persons in opposition to this case presented credible evidence that the proposed gasoline service station would draw interstate travelers by alerting them of its location through signage along I-70, the Route 94 off-ramps, and just before Old Frederick Road drawing motorists' attention to the existing gas station. These signs also signal the interstate motorist to that gas stations are only a very short distance from I-70. Although the Hearing Examiner accepts the Petitioner's testimony that the use is not solely focused on interstate travelers, they are part of the gasoline service station customer base. The Petitioner has convincingly demonstrated that the Site adjoins or is part of the Lisbon Village and Community Center, which encompasses the Lisbon Shopping Center, the existing High's and the PNC Bank to the west of the proposed gasoline service station.

The two applicable 3.10 policies emphasize the necessity for development to be appropriate in scale and compatible with rural residential uses. As presented, the Second Amended Plan (Petitioner's Exhibit 1B) showing the alternate parking space allocation called for in the TSR, and the proposed landscape plan (Petitioner's Exhibit 2), fail to convince the Hearing Examiner that the proposed uses are of an appropriate scale and compatible with rural

residential uses and will not cause atypical adverse impacts under the general standards for conditional uses and also comply with the specific criteria for gasoline service stations, as discussed below. This conclusion is reached in part based on the inadequacy of the proposed buffers, which is addressed below. Moreover, while Old Frederick Road is classified as a Major Collector, the evidence indicates that the two-lane road east of MD 94 is mainly residential in character.

The Hearing Examiner is therefore obliged to conclude that the scale and compatibility of the proposed uses would do much more than serve the needs of the surrounding community and are incompatible with residential uses in the facility. During the hearing, the Hearing Examiner called attention to the 4,800 square foot size of the convenience store, the largest of any approved as part of a gasoline service station conditional use in the last 10 years, and which together with the required parking results in a site plan with an inadequate buffer between the gasoline service station use and the surrounding community. Although the 6 proposed MPDs may be close to the average number of new gas stations, and not specifically targeted toward interstate travelers, the associated hours of operation for fueling and convenience store customers is out of character with those approved by the Hearing Authority in the last 10 years in areas where gasoline stations are insinuated into rural residential neighborhoods, as will be discussed in detail below.

For all these reasons, the proposed petition is not in harmony with the land use policies indicated in the General Plan for the district. The petition does not comply with Section 131.B.1.

**B. Adverse Impacts.** Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

The assessment of a proposed conditional use under these criteria recognizes the potential for adverse impact by virtually every human activity. Conditional use zoning therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in an RR district. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects beyond those inherently associated with such a special exception use irrespective of its location within the zone. People's Counsel for Baltimore County v. Loyola College in Maryland, 406 Md. 54, 956 A.2d 166 (2008); Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981); Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Hearing Examiner is not persuaded the Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a gasoline service station in a B-2 district.

**a. Physical Conditions.** The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be

**greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.**

With respect to noise, the TSR reasons that the Site's elevation and proposed hours of operation 5:00 a.m. to 12:00 a.m. has the potential for greater adverse noise impacts because diesel fuel sales will attract diesel commercial trucks and vans, as well as diesel school buses, which are noisier than other customers. The proposed hours of operation are addressed below in the Section 131.N.25 evaluation.

A further consideration is the Petitioner's testimony that air pressure and vacuum services would be provided on the western boundary of the Site, across from the fueling islands. The potential to generate an inordinate amount of noise from these uses in a location in direct alignment with the open western egress is very real, especially considering the absence of any proposed screening to help block the noise. The Petitioner's evidence on the effects of noise is not persuasive. Accordingly, the Hearing Examiner concludes the Petitioner has inadequately shown that any noise generated by the proposed uses will not be greater than that which is ordinarily associated with a gasoline service station use in the B-2 district. There is no evidence of heightened dust, vibrations, or hazards related to the use.

The Petitioner adequately demonstrated that the proposed gasoline service station would not cause light trespass. Nonetheless, the Petitioner's evidence that there would be no adverse lighting effects—which is distinguishable from light trespass—relies to a significant degree on the testimony and exhibits relating to the canopy's buffering by proposed and existing landscaping. According to Petitioner's Exhibits 3A and 3B, the Petitioner relies to a



significant degree the presence of multiple deciduous and tall evergreen trees on residential properties to buffer the gasoline service station. The proposed landscaping along Old Frederick Road in front of the canopy would consist of 13 deciduous shade trees and shrubs. The record indicates that the Petitioner chose these plantings because they would be not interfere with overhead utility lines.

The proposed landscape buffer has a second function, which also relates to the adverse lighting impact evaluation of the gasoline service station. The TSR recognizes that the Site sits at a higher elevation than area residences, which has the potential to greater adverse impacts to area residences than other B-2 locations, such as the current shopping center location. Petitioner's plane sections Exhibit 3A and 3B are in part responses to the elevation differences, but they rely on off-site vegetation to mitigate any potential adverse lighting impacts. Although Ms. Moser opined that the proposed onsite landscaping would provide a sufficient buffer if the offsite landscaping is discounted, the Hearing Examiner is unable to evaluate the adverse effects of lighting from the use in the absence of the appropriate plane views that adequately demonstrate this contention.

With respect to adverse effects caused by odors, the opposition argued for the petition's denial because the child of an adjoining property owner suffers debilitating headaches worsened by smells. Her physician recommends that she avoid gasoline fumes.

While I am sympathetic to the family's undoubted challenges, the law of land use as it concerns conditional uses does not permit me to deny the petition based on what the Petitioner's counsel, through case law, characterized as an adverse impact on a person not of

normal sensitivities, citing to *Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956). While this case involved a nuisance suit for damages arising from deliberate, long-continued noise emanating from a neighbor's premises, not a zoning dispute, the same adverse impact standard applies to zoning law and is to be measured against a reasonable person of normal sensitivity.<sup>7</sup>

The Petitioner has met its burden of demonstrating that gasoline odors emanating from the gasoline service station would not generate atypical adverse impact on persons of normal sensitivity even, even in the winter, when prevailing winds would travel from the north and northeast. Additionally, Petitioner witness Michael Schammel presented credible evidence that the proposed gasoline service station would be required to comply with federal, state and county air quality permit vapor recovery laws and regulations.

**b. Structures and Landscaping.** The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

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<sup>7</sup> This standard has its origins in the early history of zoning law as it developed out of nuisance law. Before zoning was upheld as constitutional in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), local jurisdictions used their police power to regulate the externalities (noise, dust, fumes, odors) of many land uses, including, notably, garages, filling stations, and slaughterhouses. The substantial body of nuisance case law informing this era of regulation was one precursor to land use regulation through zoning. See generally Mandelker and Payne, *Planning and Control of Land Development: Cases and Materials*, Seventh Edition. Lexis Nexis Publishing (2008). Professor Mandelker, a preeminent scholar in land use law and development, has elsewhere explained that the United State Supreme Court relied on nuisance law in upholding zoning in the Euclid case. Daniel R. Mandelker, *The Role of Law in the Planning Process*, 30 L. & CONTEMP. PROBS. 26, 27-31 (1965). Conditional use zoning, which controls in this case, or what was early on called exceptions or variances in Maryland zoning regulations and statutes, arose out of the recognition that zoning ordinances had to manage the adverse effects of specific externalities. The reasonable person of normal sensitivities standard is often cited in noise ordinances, although not in Howard County.

The background issues discussion leads to the necessary conclusion that the location, nature and height of of the gasoline service station use is such that it would hinder or discourage the use of adjacent land and residences more at the subject site than it would generally in the B-2 district. The Petitioner's evidence as to the compatibility of multiple gas stations and residences within similar distances of the residences in the instant case does not persuade the Hearing Examiner to conclude otherwise, absent probative evidence about the zoning, hours of operation, lighting, elevations, the age of the gasoline service stations, when the gas station conditional use was approved, the presence of other commercial uses, or whether the station was a modernization of an older station. Additionally, there is no evidence as to the character of the roads on which these gas stations are located, which, according to the TSR, is a factor to be considered, considering that generally elsewhere in the B-2 district, gas stations are located rarely across a two-lane road from several single-family detached residential uses in predominately Rural Conservation areas, and are instead typically located on more commercial roads in less rural areas with other commercial uses across the road. This scenario is born out in Petitioner's Exhibit 11R, an aerial photograph of the Fulton High's, which is located next to a commercial use, and Exhibit 11S, the West Friendship High's, also next to a commercial use.<sup>8</sup>

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<sup>8</sup> Other gas stations, such as the Citgo and BP station seen in Exhibits 11T, U, & V are older stations located in "downtown" Lisbon. While the proposed Site is next to a bank, the bank is located at an intersection and does not draw traffic into the residential area to the east.

Furthermore, as the opposition argued, the Petitioner's plane section exhibits focused on the effective buffering of the gasoline service station based on first floor views, even though the neighbors also reside on their second floors.

The Hearing Examiner respectfully disagrees with Petitioner's apparently alternative argument that the structures and uses will have no adverse impact on area residential structures because no residence shares a physical border with the Site. The Hearing Examiner has had occasion to interpret this adjacency language in Board of Appeals Case Nos. 09-035C and 10-023C (proposed gasoline service station denied), wherein she concluded the Zoning Regulations prescribe a broad array of design or performance standards intended to protect "adjacent" residential properties, by which the regulations mean neighboring properties. This definition accords with the plain meaning of "adjacent": "not distant: nearby, like the city and adjacent suburbs." <http://www.merriam-webster.com/netdict/adjacent>.

**c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

The Hearing Examiner concurs with the TSR's reasoning that the convenience store is the primary use, based on the square footage of the store, the largest of any approved by the Hearing Authority in conjunction with a gasoline service station conditional use petition. The proposed parking depicted in Petitioner's Exhibit 1B, would therefore meet minimum requirements based on the convenience store as the primary use. The parking areas, loading areas appear to be properly located and screened. The dumpster will be located behind the

convenience store and screened with board on board fencing. There is no evidence that the proposed locations of the driveways are not properly located and screened to minimize adverse impacts on adjacent properties.

**d. Access.** The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

The Addendum to the TSR comments (Pg. 6) that the Second Amended Plan shows details on sight distance and what improvements would be required to meet county standards. It is unclear to the Hearing Examiner whether the apparent deceleration lane noted by the TSR (Pg. 6) will remain after the improvements are made.<sup>9</sup> The proposed ingress and egress drives appear to provide safe access with adequate sight distance.

### **III. Specific Criteria for Gasoline Service Stations (Section 131.N.25)**

**a. The use will not adversely affect the general welfare or logical development of the neighborhood or area in which the station is proposed and will not have a blighting influence as a result of a proliferation of gasoline service stations within a particular area.**

Adverse Effects on the general welfare or logical development of the neighborhood. For the reasons discussed heretofore, the Hearing Examiner concludes the proposed gasoline service station will adversely affect the logical development of the residential neighborhood or area in which the station is proposed. Certainly, the underlying zoning is one consideration in any "logical development" evaluation, as the Petitioner's witness remarked, but it is only one element. Logical development also means "logical location," which, with respect to conditional

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<sup>9</sup> There appears to be no room for a dedicated left turn lane or bypass lane, which the TSR asked the Petitioner to address (Pg. 9).

uses, requires that the land uses be logically situated in relation to each other and the objectives of the General Plan and the Zoning Ordinance, which establish options for the logical development of the neighborhood or area, and in this case for the logical development of the Rural West. Within the zoning and land use geography of this section of Old Frederick Road, the scale and compatibility of the proposed gas station, in combination with the 4,800-sq. ft. convenience store, indicates to the Hearing Examiner that the site as developed would constitute a degree of adverse influence not constituted by a less intense and smaller scale operation, which is reinforced when we consider the insufficiency of the proposed landscaping and buffering on the elevated Site. Certainly, this adverse influence would be exacerbated by the increase in customer base resulting from the new site and improvements. Ms. Darnell, the High's Director of Real Estate, testified that the current location already services hundreds of customers a day. Without doubt, based on credible opposition testimony, the triple increase in fuel pumps and a convenience store that is almost twice the size of the existing store with the shopping center, will draw significantly more customers between the hours of 5:00 a.m. and 12:00 a.m. to the outer edge of a village center, an area that is primarily residential in character.

Blighting Influence. Howard County amended the specific conditional use standards for gasoline service stations in 2001.<sup>10</sup> Then Section 131.N.25.c was amended and retitled as

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<sup>10</sup> The 2001 amendments were part of a comprehensive revision of the Special Exception provisions of the Zoning Regulations, including changing the title of Special Exceptions to Conditional Uses. Bill No. 11-2001 (ZRA 30).

Section 131.N.25.A (and subsequently retitled as Section 131.N.25.a.) It is reproduced here as it appears in Bill No. 11-2001 (ZRA 30).

c)]A. The use will not adversely affect the general welfare or logical development of the neighborhood or area in which the station is proposed AND WILL NOT HAVE A BLIGHTING INFLUENCE AS A RESULT OF A PROLIFERATION OF GASOLINE SERVICE STATIONS WITHIN A PARTICULAR AREA.

Section 131.N.25.a is written in the conjunctive, requiring the Petitioner of a proposed gasoline service station conditional use to prove the use will not adversely affect the general welfare or logical development of the neighborhood or area AND not have a blighting influence. Hence, by operation of Section 131.N. 25.a, if the Hearing Examiner makes a negative finding as to the affect of the use on the general welfare or logical development, the evaluation ends without consideration of the blighting influence test.

Having concluded the proposed gasoline service station in this case will adversely affect the logical development of the neighborhood or area in which it is proposed, the Hearing Examiner makes no conclusions as to blighting influence.

**b. The minimum lot size for a gasoline service station is 20,000 square feet. If a gasoline service station is combined with another use on the same lot, the minimum lot size shall be increased in accordance with the provisions of Section 131.N.25.i.**

The Conditional Use Site is 3.25 acres, and the minimum lot size has therefore been increase to comply with Section 131.N.25.b.

**c. The lot shall have at least 120 feet of frontage on a public road. If at the intersection of two public roads, the total of the frontage along both roads may be used if ingress or egress is provided to both roads.**

According to the Second Amended Plan, Petitioner's Exhibit 1B, the Site has 258 frontage feet on Old Frederick Road, in accordance with Section 131.N.25.c.

**d. At least 20 percent of the site area shall be landscaped. The landscaping plan shall include plantings which enhance the appearance of the site from public roads and provide appropriate buffering for adjacent uses.**

Section 103.A.112 of the Zoning Regulations defines "buffering" within the definition of "landscaped area."

An area improved by vegetation and other natural or decorative materials, established or maintained for enhancement of the appearance of the site, noise reduction, buffering or screening. Areas used for buffering or screening are intended to provide a visual separation between uses as described below:

- a. Screening is the use of landscape materials to substantially shield a structure or use from view, to the extent possible given the topographic and other features of specific site.
- b. Buffering is the use of landscape materials to lessen the visual impact of a use, or to visually or physically separate uses, while not necessarily concealing a structure or use from view.

The Hearing Examiner is unable to determine if the landscaped area comprises 20 percent of the site area because the landscape area also includes stormwater management areas and the Landscape Manual (Pg. 17) expressly provides that stormwater management facilities may not be located in landscaped edges, and the Landscape Plan depicts a bio-retention SWM facility within the landscape edge along Old Frederick Road.<sup>11</sup>

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<sup>11</sup> The Hearing Examiner acknowledges that DPZ may have developed an internal policy on bio-retention facilities within landscape edges subsequent to new state and county stormwater management regulations, but this policy has not been discussed in any TSR.



With respect to the landscape plan, the Hearing Examiner necessarily concludes the proposed plantings will not provide appropriate buffering for adjacent uses for the reasons discussed heretofore. Nor will it properly assist in reducing noise.

**e. Solid walls such as masonry or wood and masonry may be required by the Hearing Authority when the site borders a residential district. When solid walls are required, landscape planting is required on the outside of the wall.**

The term "border" is herein used geographically, as a boundary or endpoint between the site and a residential district. Another word for "border" is adjacent: not distant: nearby <the city and *adjacent* suburbs. <http://www.merriam-webster.com/dictionary/border>. The conditional use site borders an RC residential district.

The Petitioner offered to install several landscape edges on the eastern portion of the Property and intended to be planted as part of the development of the hypothetical commercial building as part of the construction of the gasoline service station. The Petitioner also offered to install a fence or wall along the eastern Property line. There is however, no room along Old Frederick Road for a fence or wall, so this option is closed off, even though it would help mitigate the adverse effects of a gasoline service station sitting at a higher elevation than the residences across Old Frederick Road.

**f. Refuse areas shall be fenced or screened from view. The plan shall indicate the disposal methods to be used for all waste material generated by vehicle repair operations.**

According to the petition, the dumpster will be fenced and screened from view. Conditional Use Plan Note 15 provides the methods of disposal for waster material, in accordance with Section 131.N.25.f.

**g. Access driveways and on-site paved areas shall be designed and located to ensure safe and efficient movement of traffic and pedestrians.**

The Petitioner presented credible evidence that the location of access driveways will be designed and located to ensure safe and efficient movement of traffic and pedestrians, in accordance with Section 131.N.25.g.

**h. Operation**

**(1) Outside operations shall be limited to the dispensing of gasoline, oil, water, pressurized air, the changing of tires and minor servicing. Storage of all automotive supplies shall be within the main structure.**

The Petitioner witness testified that pressurized air and vacuuming services would be provided to the west of the fueling islands and that outside operations will be limited to the dispensing of gasoline, oil, water, air, and minor servicing, in accordance with Section 131.N.25.h.1.f.

**(2) Vending machines and the sale of propane are permitted as accessory uses, provided these uses are screened or enclosed if required by the Hearing Authority.**

No vending machines or propane sales are proposed.

**(3) The premises shall be maintained at all times in a clean and orderly condition, including the care or replacement of plant materials required in the landscaping plan. The responsibility for compliance with this provision shall be with all parties having a lease or ownership interest in the gasoline service station.**

Because the Hearing Examiner is denying the proposed gasoline service station, the use is not evaluated for compliance with these standards.

**(4) Where a gasoline service station is adjacent to a residential district, its hours of operation and a detailed lighting plan shall be approved by the Hearing Authority.**

As discussed above, the gasoline service station is adjacent to the RC-DEO residential district. The Petitioner proposes to operate the gasoline service station and convenience store 7 days a week from 5:00 a.m. to 12:00 a.m. During the hearing, the Hearing Examiner took notice that the proposed hours exceed those previously approved for High's stores with gasoline service stations in close proximity to residential districts.

For the reasons discussed above, the lighting plan is not acceptable.

**i. Other Uses**

**(1) Other uses may be located on the same lot as a gasoline service station, including uses permitted in the zoning district as well as car washes and convenience stores, provided that all uses are approved by the Hearing Authority and the minimum lot area is increased to accommodate the combination of uses. At a minimum, the minimum lot size of 20,000 square feet must be increased by an area equal to the gross square footage of floor area, parking area and loading or stacking areas required for the additional uses.**

The gasoline service station use will be combined with a 4,800-square foot convenience store and it complies with the gross-floor area requirements in of this section.

The Petitioner is also proposing to dispense diesel fuel. Because the basic proposed use, a gasoline service station, is contrary to the logical development of the neighborhood or area in which it is proposed to be located, the Hearing Examiner declines to approve it. At the hearing, the Petitioner also proposed vacuuming or outdoor air pressure uses, but did not amend the plan in the form of an exhibit pursuant to Hearing Examiner Rule 9.4, which requires a petitioner proposing to amend a petition during the course of the proceedings to do so in the form of an exhibit.

**(2) In the PEC, M-1 and M-2 districts, the gross floor area of convenience stores shall not exceed 3,500 feet.**

This section is inapplicable because the Site is zoned B-2.

#### **IV. The Carry-Out Restaurant**

While reviewing the exhibits during the drafting of this decision and order, the Hearing Examiner became aware that the parking calculation notes on the Second Amended Plan reference 3 parking spaces on the Site for a "400-square foot carry-out restaurant." The Petitioner presented no testimony about the carry-out restaurant. (There was testimony that the proposed High's would be similar to the Rogers Avenue High's, which has several booths.) It is not discussed in the section of the conditional use petition where the Petitioner is asked to describe the types of proposed indoor and outdoor activities.

Section 103.A.167 of the Zoning Regulations defines a "carry-out restaurant" as "[a]n establishment, such as a delicatessen or ice cream parlor, which prepares and sells food products intended for ready consumption, which are generally packaged in paper or served in other types of disposable plates, wrappers, or containers for consumption off the premises, but which may provide thirty or fewer seats for use by eat-in customers." Because carry-out restaurants are a permitted use in the B-2 district, a convenience store could incorporate the use as a matter of right, with up to 30 seats.

This decision and order does not address the additional impact of any carry-out restaurant because it is uncertain whether the Petitioner intends to include the use within the High's store. For the record, the Hearing Examiner reasons that the inclusion of a carry-out

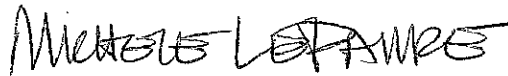
restaurant on the Site is additional grounds for denying the petition. Although the minimum number of parking spaces would be provided on-Site, it is questionable whether 3 parking spaces are sufficient, as convenience stores are highly popular lunch stops with construction workers, contractors and tradesmen. Certainly, a carry-out restaurant within a convenience store supports DPZ's conclusion that the convenience store is the primary use.

**ORDER**

Based upon the foregoing, it is this **7<sup>th</sup> day of December 2011**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of St. Johns Properties, Inc. is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER

A handwritten signature in black ink, appearing to read "MICHELE LEFAIVRE", written over a horizontal line.

Michele L. LeFaivre

Date Mailed: \_\_\_\_\_

**Notice:** A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.